



Robert Weatherford (“Weatherford”) was convicted in Madison Circuit Court of murder and conspiracy to commit murder. Weatherford entered into a sentencing agreement with the State and agreed to a sentence of life without parole. Weatherford unsuccessfully moved to withdraw the sentencing agreement and appealed the denial of his motion. Our supreme court determined that the trial court acted within its discretion in denying Weatherford’s motion to withdraw his sentencing agreement. Weatherford later filed a petition for post-conviction relief challenging the effectiveness of his appellate counsel, which the post-conviction court denied. Weatherford appeals and argues that his appellate counsel was ineffective for failing to adequately present the issue of whether his Boykin rights had been violated. Concluding that appellate counsel was not ineffective and that the issue was resolved in Weatherford’s direct appeal, we affirm.

### **Facts and Procedural History**

Facts pertinent to this appeal are found in our supreme court’s resolution of Weatherford’s direct appeal.

On October 17, 1995, a jury convicted Weatherford of murder and conspiracy to commit murder. After the judge entered the judgment of conviction, but prior to the penalty phase of his capital trial, Weatherford entered into a sentencing agreement with the State. In the agreement, Weatherford admitted killing the victim to prevent him from testifying against Weatherford in other criminal matters. The State agreed not to pursue the death penalty in exchange for Weatherford’s acceptance of a sentence of life without parole.

The court held a hearing on October 18, 1995, to consider accepting the agreement. Weatherford indicated he had read and signed the document. The judge invited counsel to suggest how to proceed further. The prosecutor recommended that “someone ought to at the minimum examine him to make sure he understands the terms of the agreement....” The judge stated he would read the agreement to Weatherford paragraph by

paragraph and ask him if he had read and understood each. Defense counsel and Weatherford agreed to that procedure.

The judge then read the clauses of the agreement. Weatherford verbally acknowledged that he had read each term and understood it. The court advised Weatherford that it could either accept or reject the sentencing agreement, but that if it accepted the agreement it would be bound by it. Weatherford stated that he believed the sentencing agreement was in his best interest and acknowledged that he was satisfied with the performance of his defense. He stated that he understood that he was waiving all his rights to appeal the agreement. The court advised Weatherford that either the court or the jury would have to find the existence of an aggravating circumstance beyond a reasonable doubt before imposing a sentence of life without parole. Weatherford stated that he understood his right to present mitigation evidence, and voluntarily waived that right. He also acknowledged that he received no promises or inducements to enter into the sentencing agreement.

On November 13, 1995, Weatherford filed a motion to withdraw his sentencing agreement, arguing primarily that he had not knowingly and voluntarily entered into the agreement. Following a hearing on the motion, on November 15, 1995, the trial court denied the motion to withdraw the sentencing agreement and, in accordance with the terms of the agreement, sentenced Weatherford to life without parole.

Weatherford v. State, 697 N.E.2d 32, 33 (Ind. 1998) (record citations and footnotes omitted).

On direct appeal, Weatherford argued that the trial court abused its discretion when it denied his motion to withdraw his sentencing agreement. Specifically, Weatherford asserted that “his plea was made involuntary and unknowing by the trial court’s failure to advise him of his rights” as required by Indiana Code section 35-35-1-2. Id. at 34-35. Our supreme court noted that section 35-35-1-2 applies only to pleas of guilty or guilty but mentally ill and declined to apply the formal requirements imposed by that statute to sentencing agreements. Id. at 35. The court also noted Weatherford’s argument that “it was wrong to deny his request to withdraw his agreement because the court failed to advise him of his ‘Boykin rights[.]’” Id. at n.8. The court then stated,

“Section 35-35-1-2 codifies the principles of *Boykin*, so the statutory discussion above resolves Weatherford’s *Boykin*-based arguments.” Id.

On August 15, 2000, Weatherford filed a petition for post-conviction relief and an amended petition was filed on July 17, 2006. In his amended petition, Weatherford alleged that he did not waive his *Boykin* rights prior to entering into the sentencing agreement and his appellate counsel “failed to adequately present this issue to the Indiana Supreme Court.” Appellant’s App. p. 310. The State then filed a motion for summary judgment asserting that the issues raised in Weatherford’s petition were resolved by the supreme court’s decision in his direct appeal. Appellant’s App. p. 317. On September 7, 2006, the post-conviction court granted the State’s motion and issued an order denying Weatherford’s petition for post-conviction relief.<sup>1</sup> Weatherford now appeals.<sup>2</sup>

### **Standard of Review**

Post-conviction procedures do not afford petitioners an opportunity for a “super appeal.” Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; Ind.

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<sup>1</sup> In his brief, Weatherford initially argues that the trial court erred when it granted the State’s motion for summary judgment because his claim for ineffective assistance of appellate counsel presents a factual controversy. However, Weatherford next asserts that “it is possible for this Court to properly review this case on its merits.” Br. of Appellant at 6. He concedes that the only issue to be decided by our court is a legal issue as “a court is justified in inferring that counsel would not confess deficient performance.” Id. Because Weatherford is arguing that appellate counsel was ineffective for her presentation of the Boykin issue and Weatherford’s brief submitted on direct appeal is part of the post-conviction record, remanding for an evidentiary hearing is unnecessary and we will decide this case on its merits.

<sup>2</sup> In its brief, the State contends that Weatherford’s appeal should be dismissed because he waived his right to seek post-conviction review in the sentencing agreement. The State acknowledges previous decisions from our court holding that provisions of plea agreements purporting to waive rights to post-conviction review are void and unenforceable, see e.g. Majors v. State, 568 N.E.2d 1065, 1067-68 (Ind. Ct. App. 1991), trans. denied, yet urges us to adopt the reasoning of several federal circuit courts of appeals allowing waivers of post-conviction rights to be enforced in certain circumstances. We decline to do so.

Post-Conviction Rule 1(1) (2007). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

### **Discussion and Decision**

Claims of ineffective assistance of appellate counsel are governed by the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002). A defendant claiming a violation of the right to effective assistance of counsel must first show that counsel's performance was deficient. Strickland, 466 U.S. at 687; Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). This requires a defendant to show that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel as guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687-88; Timberlake, 753 N.E.2d at 603. A defendant must also show that counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; Timberlake, 753 N.E.2d at 603. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Timberlake, 753 N.E.2d at 603.

“There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel’s actions deny the defendant her right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as they would be had counsel waived the issue.” Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006). Weatherford’s claim falls in the third category.

Claims of ineffective assistance for inadequate presentation of issues that “were not deemed waived in the direct appeal are the most difficult for defendants to advance and are almost always unsuccessful.” Harrison v. State, 707 N.E.2d 767, 787 (Ind. 1999).

. . . [T]hese claims essentially require the reviewing tribunal to re-view specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.

Bieghler v. State, 690 N.E.2d 188, 195 (Ind. 1997). Therefore, “an ineffectiveness challenge resting on counsel’s presentation of a claim must overcome the strongest presumption of adequate assistance. Judicial scrutiny of counsel’s performance, already ‘highly deferential,’ is properly at its highest.” Id. (citation omitted).

In the Appellant’s Brief filed in Weatherford’s direct appeal, appellate counsel argued that Weatherford was not advised of his Boykin rights, and therefore, Weatherford did not knowingly, voluntarily and intelligently enter into the sentencing agreement. See Appellant’s App. pp. 403-10. Counsel provided citation to Boykin v. Alabama, 395 U.S.

238 (1969) and relied on Boykin to support her argument. Moreover, counsel specifically noted that although Boykin rights are codified in Indiana Code section 35-35-1-2, “the question of the effectiveness of a waiver of a federal constitutional right is governed by federal standards.” Appellant’s App. p. 404.

Therefore, we cannot agree with Weatherford’s assertion that appellate counsel “failed to argue that Weatherford’s rights under the United States Constitution had been violated.” See Br. of Appellant at 8. Furthermore, our supreme court considered and addressed (albeit briefly) Weatherford’s Boykin argument in its resolution of his direct appeal. See Weatherford, 697 N.E.2d at 35 n.8. Our review of the Appellant’s Brief filed in the direct appeal leads us to the conclusion that appellant counsel adequately presented the issue of whether Weatherford’s Boykin rights had been violated. Accordingly, Weatherford has not established that his appellate counsel was ineffective, and the trial court’s denial of his petition for post-conviction relief is affirmed.

Affirmed.

NAJAM, J., and MAY, J., concur.